Filed 3/11/09 Brown v. Cal. Unempl. Ins. App. Bd. CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

KAREN S. BROWN,

Plaintiff and Appellant,

v.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD,

Defendant and Respondent;

ROMBRO & ASSOCIATES,

Real Party in Interest and Respondent.

B206044
(Los Angeles County
Super. Ct. No. BS106091)

APPEAL from a judgment of the Superior Court of Los Angeles County, David P. Yaffe, Judge. Affirmed.

Eric A. Kuzdenyi for Plaintiff and Appellant.

Rombro & Associates, S. Roger Rombro and Melinda A. Manely for Real Party in Interest and Respondent Rombro & Associates.

No appearance for Defendant and Respondent California Unemployment Insurance Appeals Board.

Appellant Karen S. Brown was dismissed by her employer, Rombro & Associates, and was ruled ineligible for unemployment insurance benefits by the California Unemployment Insurance Appeals Board (Board) based on Brown's misconduct. The superior court denied Brown's petition for a writ of mandate. On appeal, Brown claims that court erred in affirming the decision of the Board because the finding of misconduct, namely, that she was tardy to work and late for court appearances was not supported by evidence in the administrative record. As we shall explain, we disagree. Substantial evidence in the record supports the conclusion of the superior court. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In July 2005, Rombro & Associates (hereinafter "Rombro"), a small law firm hired Brown to work as an attorney in the firm. She was fired by the firm on November 21, 2005, and sought unemployment benefits. The request for benefits was granted by the California Employment Development Department (the "Department"), but Rombro objected claiming Brown was ineligible for benefits because she was terminated for misconduct. Thereafter, in March 2006 a hearing in the matter was held before an administrative law judge (ALJ). The following facts appear in the administrative record developed at that hearing.

The Rombro office manager testified that the firm's employees, including the lawyers, were expected to arrive at the office by 9:00 a.m. in the morning, but that during the entire five months Brown worked at the firm she never arrived before 11:00 a.m. and sometimes arrived as late as 3:00 p.m. The office manager also testified that Brown also arrived late to a number of court hearings in October and November 2005, including several ex parte hearings, and that as a result the requested relief was denied. Rombro also presented evidence of client correspondence about Brown, complaining that she had arrived late to court.

Roger Rombro, the principal of the firm, also testified during the proceeding. He testified that when he hired Brown he orally informed her that she was expected to be at work at 9:00 a.m. Mr. Rombro stated that during the entire time Brown worked at his firm she arrived at approximately 9:00 a.m. only twice—and those instances corresponded to office meetings which had been set for 8:00 a.m. He further testified he gave Brown two oral warnings, one in early October 2005 and another in early November 2005, about her late arrivals to the office and court appearances. Mr. Rombro indicated that after the second meeting in November he made a concession for Brown to arrive at 10:00 a.m., but that even after that she did not arrive at the office until after 11:00 a.m. Mr. Rombro had a final face-to-face meeting with Brown on November 17, 2005. According to Mr. Rombro, during this meeting, he told her that her attendance was "deplorable and unacceptable" and that she had to change it. Mr. Rombro testified he told Brown during that meeting he was on the verge of firing her and that the only reason he had not done so was because of her years in practice he wanted to give her the opportunity to correct her conduct.

Nonetheless, Mr. Rombro testified that Brown had an ex parte hearing the next morning, on November 18, 2005, and that she arrived late and the requested relief was denied. Later that day, Brown wrote a three-page memorandum to Mr. Rombro purporting to pertain to their conversation the evening before. In the memorandum, Brown stated that she would try to accommodate his requests, but that she wanted to set the record straight and felt that she had been "unfairly targeted." The memorandum addressed a number issues relating to cases, case management, office communication and her personal matters. The only references to her attendance and punctuality, included the admission: "[p]erhaps I am not the best time manager at all times . . . [and] I resent the assumption that because I am not in the office physically, I am not working. That is a prehistoric notion and implies that I am not a professional."

Mr. Rombro stated he received the memorandum on Saturday, November 19th, and when he read it, he came to the conclusion that because Brown had not really addressed or taken any responsibility for her conduct and tardiness, that she would not be

able to correct the situation. Mr. Rombro prepared a 14-page memorandum to Brown which memorialized their conversation of November 17, their prior conversations about her missing deadlines and untimely court appearances in October and early November and provided a detailed response to Brown's November 18, memorandum. At the end of Mr. Rombro's memorandum he terminated her employment effective Monday, November 21, 2005. Mr. Rombro left his memorandum on Brown's chair and stated that Brown received it when she arrived at work, after 11:00 a.m. on November 21. Mr. Rombro reiterated that Brown was fired because Brown could not be relied upon to arrive on time.

Brown also testified at the hearing before the ALJ. She denied that Mr. Rombro ever warned her about her attendance or arrival time, though admitted that they had one exchange about it which did not get into detail. She testified that she had to attend physical therapy for a while in the mornings. She further claimed that she and Mr. Rombro had an understanding that she could come in a little later because she worked until 9 or 10 o'clock at night. She admitted that she usually came in between 10:30 a.m. and 11:00 a.m. Brown further admitted that she had missed a court appearance in Ventura because she had not allowed enough travel time to get there. Brown further acknowledged that she and Mr. Rombro met on November 17, 2005, and had a discussion about a number of things including her arriving on time.

The ALJ issued his decision in early April 2006. In the decision, the ALJ found that Brown was terminated for "excessive attendance problems and poor work performance." In the statement of facts the ALJ referenced Brown's failure to arrive at work and court appearances on time despite two oral warnings and an accommodation that she could arrive at work at 10:00 a.m. The decision mischaracterizes the November 17th warning as "written," but nonetheless, notes that a final warning was given to Brown on that date. The decision also references Brown's memorandum of November 18, in which she failed to acknowledge her tardiness problem and instead attempted to deflect issues and blame onto Rombro and his office and case management. The ALJ noted that after receiving Brown's memorandum, Mr. Rombro became "flustered as he recognized

that the claimant had failed to acknowledge the reprimands that she had been receiving on the previous three occasions, primarily having to do with her reliability in terms of time and attendance [and] [a]s a result of the claimant's failure to acknowledge and to make an attempt at correcting the situation with regard to her attendance, the employer decided that it would be in the best interests of the firm to terminate the claimant."

The ALJ's decision found that the Rombro firm had met its burden to show it had terminated Brown for her tardiness and that such conduct amounted to "misconduct" under the Unemployment Insurance Code section 1256. Consequently, the ALJ concluded that Brown was not entitled to unemployment benefits and reversed the prior determination of the Department. The ALJ further noted "[u]nder the totality of the circumstances, [Brown's] testimony that she had never been warned is disbelieved. It is clear that claimant is practiced at deflecting criticism." The ALJ also observed that Brown conceded that she received the warning about her tardiness on November 17, and yet continued to arrive late.

Thereafter Brown appealed the ALJ's decision to the California Unemployment Appeals Board. In July 2006, the Board adopted the findings, analysis and conclusion of the ALJ and affirmed the decision to deny Brown unemployment benefits.

In November 2006, Brown filed a petition for writ of administrative mandamus under Code of Civil Procedure section 1094.5 in the superior court. Brown requested an order to set aside the Board's decision denying her benefits. She claimed the ALJ's decision lacked support in the evidence and was legally erroneous. Rombro opposed the petition.

Following a hearing on June 20, 2007, the superior court denied the writ petition, finding that Brown had failed to carry her burden to prove administrative findings were against the weight of the evidence, and instead the court found that based on its independent examination of the administrative record, the weight of the evidence produced at the administrative hearing supported the administrative findings and decision. Judgment was entered on December 31, 2007.

Brown timely appeals.

DISCUSSION

On appeal, Brown contends that the superior court erred in denying her writ petition. We disagree.

A. *Standards of Review*

In reviewing administrative decisions denying unemployment insurance benefits in a mandamus proceeding under Code of Civil Procedure section 1094.5, the superior court "exercises its independent judgment on the evidence and inquires whether the administrative agency's findings are supported by the weight of the evidence. [Citations.] Except where relevant evidence has been excluded at the administrative hearing or could not be produced by the exercise of reasonable diligence, the superior court's independent review focuses on the evidentiary record made at the administrative level." (*Lacy v. California Unemployment Ins. Appeals Bd.* (1971) 17 Cal.App.3d 1128, 1132.)

While the superior court exercises its independent judgment on the administrative evidence, the appellate court employs a narrower and more deferential standard. "The power of appellate review of the trial court judgment is restricted to a determination of whether the trial court, in conducting its independent review of the administrative record, made findings of fact and a judgment which are supported by substantial evidence. (*Drysdale v. Department of Human Resources Development* (1978) 77 Cal.App.3d 345, 351.) Consequently, so long as substantial evidence supports the trial court's findings of fact, the appellate court may disregard the conflicting evidence, resolve conflicting inferences in favor of the prevailing party, and affirm the judgment. (*Id*. at pp. 351-352; *Nordquist v. McGraw-Hill Broadcasting Co.* (1995) 32 Cal.App.4th 555, 561 [Court of Appeal considers "the evidence in the light most favorable to the prevailing party, giving that party the benefit of every reasonable inference and resolving conflicts in support of the judgment. [Citation.]".) However, "substantial evidence" is not "'synonymous with "any" evidence. It must be reasonable . . . , credible, and of solid value . . . .' [Citation.]" (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633.)

Furthermore, "the determination whether there was substantial evidence to support a finding or judgment must be based on the whole record." (*Rivard v. Board of Pension Commissioners* (1985) 164 Cal.App.3d 405, 412.)

B. The Superior Court Properly Denied Brown's Petition

Under Unemployment Insurance Code section 1256,[1] "[a]n individual is disqualified for unemployment compensation benefits if . . . he or she has been discharged for misconduct connected with his or her most recent work."

Interpretation of section 1256 is governed by the legislatively declared public policy that unemployment insurance benefits are extended to persons "'unemployed through no fault of their own . . . .' (§ 100.)" (*Rowe v. Hansen* (1974) 41 Cal.App.3d 512, 520-521.) Thus, the term "misconduct," as used in section 1256, "is limited to '". . . conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrent as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed 'misconduct' within the meaning of the statute."'" (*Agnone v. Hansen* (1974) 41 Cal.App.3d 524, 528, quoting *Maywood Glass Co. v. Stewart* (1959) 170 Cal.App.2d 719, 724.)

Misconduct need not involve a deliberate plan or design to harm the employer. In *Agnone v. Hansen*, *supra*, 41 Cal.App.3d at pages 528-529, the court found a housekeeper who had persistently neglected her duties and argued with her employer

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[1] All further statutory citations are to the Unemployment Insurance Code, unless otherwise indicated.

displayed misconduct, reasoning that her actions evinced "carelessness and negligence of such degree and recurrence as to manifest wrongful intent and to show an intentional and substantial disregard of the employer's interests and of the [housekeeper's] duties and obligations to her employer." In addition, "[t]o constitute a discharge for misconduct, there must be a causal relationship between the individual's act or acts of misconduct and the discharge." (Title 22, Cal. Admin. Code §1256-30(c).)

In this context misconduct includes tardiness to work. (*Drysdale v. Department of Human Resources Development, supra,* 77 Cal.App.3d at pp. 353, 357.) The regulations governing misconduct, specifically, Title 22 of the California Administrative Code, section 1256-40 provides that "the employee's obligation to arrive at work on time is an implied obligation which the employer does not have to set forth at the time of hire." (*Id.*, subd. (b).) It further provides that "tardiness is misconduct" under such circumstances: "Repeated inexcusable tardiness to work despite a recent warning that inexcusable tardiness may result in discharge." (*Id*., subd. (c).)

Finally, we note that the employer shoulders the burden of establishing misconduct under section 1256. (*Maywood Glass Company v. Stewart, supra*, 170 Cal.App.2d at p. 725.)

Here, the superior court found that the weight of the evidence supported the Board/ALJ's finding that Brown was ineligible for benefits due to misconduct, namely that Brown was consistently late to work and to several court appearances.

There is ample evidence to support these findings. The record discloses that for the five months Brown worked at the Rombro firm she was persistently late for work despite having been told that she was expected to arrive at the office by 9:00 a.m. In addition, Rombro presented evidence that even after he gave an accommodation for Brown to arrive at 10:00 a.m. she nonetheless, by her own admission did not arrive before 10:30 a.m. The evidence further showed that in October and November 2005, she was late for several court appearances and kept clients waiting at the courthouse and that as a result of her tardiness to court, her clients were denied the relief sought. Furthermore, she was given three oral warnings about her attendance problems—the last

of which she acknowledged was on November 17, 2005. Nonetheless, the record shows she was late for a court appearance the very next day on November 18, which resulted in the denial of the ex parte motion she sought to file. She was also late to work again on the day she was fired, November 21, 2005. Finally, the evidence shows that rather than take responsibility for her actions, she sought, in her November 18 memorandum to deflect them. Accordingly, the superior court could properly conclude that, in view of the prior warnings, Brown had displayed a willful or wanton disregard of his employer's interests. (See *Drysdale v. Department of Human Resources Development*, supra, 77 Cal.App.3d at pp. 356-357 [discharged legal secretary ineligible for unemployment insurance benefits because she was repeatedly late for work, despite prior warnings; concluding it was reasonable to infer from recurring tardiness that employee's actions were intentional and showed a substantial disregard of the employers interest].)

We recognize that Brown's testimony challenged Rombro's showing on some matters, including whether Brown actually received some of the prior warnings. However, review for substantial evidence "begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the determination [of the trier of fact], and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the [trier of fact]." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874, italics omitted.)

Brown's arguments on appeal to the contrary are unpersuasive. First she claims that the Board/ALJ erred in finding misconduct because there was no "causal connection" between her termination and her attendance. Instead she asserts that she was fired, not because she was tardy, but instead because of her response to the employer in her memorandum of November 18. Though Brown is correct that her memorandum prompted her employer to terminate her employment, these events are not unrelated to her tardiness problem. Indeed, as Mr. Rombro testified, because Brown failed to take responsibility and acknowledge her conduct and attendance problems in her memorandum of November 18, he became convinced that she would not be able to

rectify the situation and be trusted to arrive on time in the future. Thus, in our view, the entirety of Brown's conduct and her tardiness problems, including the failure to acknowledge she had a problem, were causally connected to her termination.

Rowe v. Hansen, *supra*, 41 Cal.App.3d 512 lends guidance. In *Rowe*, a restaurant employee was warned numerous times over a period of three years concerning infractions of her employer's policies. (*Id*. at p. 516.) She was fired after she directly refused to place her arms in the sleeves of the sweater that she was wearing. (*Ibid*.) The testimony before the superior court indicated that her supervisor had terminated her due to this refusal, and not due to an accumulation of misdeeds. (*Id*. at p. 517.) Nonetheless, the superior court determined that the employee was not eligible for unemployment insurance benefits on the basis of the employee's entire record, stating that the supervisor knew this record even though the supervisor did not expressly rely on it. (*Id*. at p. 518.)

The Court of Appeal in *Rowe* affirmed the superior court, reasoning that "fault is the basic element in interpreting" section 1256, and that "the test for misconduct is essentially volitional." (*Rowe v. Hansen*, *supra*, 41 Cal.App.3d at p. 521.) For this reason, the employee's prior misconduct was properly examined as evidence of her intent when she was terminated, regardless of the narrow express grounds for her termination. (*Id*. at p. 522.) The *Rowe* court thus concluded that the conduct, viewed in its entirety, properly supported the inference that her refusal to wear the sweater was "a manifestation of a persistent and enduring intractability . . . ." (*Id*. at pp. 522-523.)

Finally, Brown argues that the Board/ALJ's decision cannot be affirmed because the ALJ's decision contains two erroneous factual findings that are not supported by the administrative record. She points out: (1) that the ALJ mischaracterized the November 17, 2005, warning as written, when in reality it was an oral warning; and (2) that decision misstates that Mr. Rombro had decided to fire Brown prior to November 21, 2005. While we agree that the ALJ mischaracterized the form of the November 17 warning, he did not mischaracterize Mr. Rombro's state of mind when he decided to fire Brown. Indeed, Mr. Rombro stated that he intended to fire Brown on November 17, but did not do so because he recognized her years of practice and wanted to extend to her the opportunity to change

her ways. In any event, Brown has not demonstrated how either of these two purported statements are dispositive on this appeal. The particular form of warning Brown was given on November 17 matters not—what matters is the fact that the warning was given, Brown acknowledged as much, and yet did not take heed of it as demonstrated by her conduct after November 17, 2005. Moreover, the timing of when Mr. Rombro decided to terminate Brown is immaterial in view of the evidence that the decision to discharge Brown was based on her tardiness.

In sum, the superior court did not err in denying Brown's petition for writ of mandate.

DISPOSITION

The judgment is affirmed. Rombro is entitled to costs on appeal.

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WOODS, J.

We concur:

PERLUSS, P.J. **ZELON, J.**